

BEFORE SANDRA SMITH GANGLE, ARBITRATOR

In the Matter of the Arbitration)	
between)	
)	
MUNICIPAL EMPLOYEES,)	
LABORERS' LOCAL 483,)	
)	
Union,)	DECISION AND AWARD
and)	
)	
CITY OF PORTLAND,)	Ahmend (Derrick) Brooks Grievance
)	
Employer)	
)	
_____)	

Hearing Conducted: May 14 and 15, 2002

Representing the Union: DAMON MABEE, Field Representative
Municipal Employees, Laborers' Local 483
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Representing the Employer: LORY KRAUT, Deputy City Attorney
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Arbitrator: Sandra Smith Gangle, J.D.
Sandra Smith Gangle, P.C.
P.O. Box 904
Salem, OR 97308

Date of Decision: July 15, 2002

BACKGROUND

This matter came before the arbitrator pursuant to two successive Memoranda of Agreement, the first of which became effective on July 1, 1998, and the second on July 1, 1999, each of which extended the terms of a 1996-98 collective bargaining agreement between the City of Portland and the District Council of Trade Unions (DCTU), subject to certain agreed changes. See Jt. Exhibits 1A and 1B and Jt. Ex. No. 2. Laborers' Local 483 is one of the member unions participating in the DCTU and the referenced agreements.

A grievance was filed on behalf of Ahmend (aka Derrick) Brooks (hereafter referenced as "the Grievant") on or about July 17, 2001. Jt. Ex. No. 4. The grievance moved directly to Level Four of the contractual grievance procedure – Mediation. The parties were unable to resolve the matter through mediation and the Union moved it to arbitration. The parties mutually selected Sandra Smith Gangle, J.D., of Salem, Oregon, through selection procedures of the Oregon Employment Relations Board, as the labor arbitrator who would hear and decide the matter.

The hearing was conducted on May 14 and 15, 2002 in a conference room of the Portland City Hall, Portland, Oregon. The parties were thoroughly and competently represented by their respective representatives throughout the hearing. The City of Portland (hereafter referenced as "the City" or "the Employer") was represented by Lori Kraut, Deputy City Attorney. The Union and the Grievant were represented by Damon Mabee, Field Representative, Laborers' Union Local 483.

At the start of the hearing, the Employer raised objections to substantive and procedural arbitrability of the grievance. The parties stipulated that the arbitrator would have the authority to decide both arbitrability issues. They further agreed that the hearing would not be bifurcated,

but that testimony and evidence would be offered on the merits of the case as well as the arbitrability issues. The arbitrator was directed, however, to decide the arbitrability issues prior to deciding the merits of the case and she was only authorized to proceed on the merits in the event the grievance was determined to be arbitrable.

The parties were each afforded a full and fair opportunity to present testimony and documentary evidence in support of their respective positions. The arbitrator tape-recorded the hearing as an adjunct to her personal notes. The parties agreed that the arbitrator's tapes were not an official record of the hearing, but were her personal property and would not be available to either party following the hearing.

The following witnesses appeared and testified under oath and were subject to cross-examination:

(a) For the Union: James McEchron, Business Manager, Laborers' Local 483; Wayne Marine; Troy Hogeland; and Ahmend (Derrick) Brooks, Grievant;

(b) For the Employer: Jeannie Nyquist, City Maintenance Director; Michael Boyle, Public Works Manager; and David Shaff, Employee Relations Manager.

At the close of the hearing, the parties elected to present written briefs in lieu of oral closing argument. They agreed that June 17, 2002 would be the date for mutual exchange of the briefs. Upon timely receipt of both briefs, the arbitrator officially closed the hearing and took the matter under advisement.

The arbitrator has considered all the testimony and evidence offered by the parties at the hearing. She has weighed all the evidence and has given careful consideration to the final arguments of the parties in reaching her decision.

STATEMENT OF THE ISSUES

The parties were not able to stipulate to a statement of the issues in this matter. They agreed, however, that the arbitrator should frame the issues, after hearing the parties' evidence and argument. The arbitrator hereby frames the issues as follows:

- (1) Is the grievance substantively arbitrable?***
- (2) Is the grievance procedurally arbitrable?***
- (3) Did the City suspend the Grievant on June 22, 2001? If so, did the City have just cause for taking the action? If the Grievant was suspended and the City did not have just cause, what is the appropriate remedy?***

RELEVANT CONTRACTUAL PROVISIONS

17. SICK LEAVE

17.1 The City will continue for the life of this agreement to provide its employees with the sick leave plan and program presently in effect, except as modified as follows: An employee will be entitled to use a maximum of four (4) consecutive work days' sick leave without a signed doctor's certificate if the employee has accumulated not less than four hundred (400) hours of sick leave. Otherwise, the employee will be entitled to use a maximum of three (3) consecutive work days sick leave without a doctor's certificate. . . .

* * * * *

Prior to taking any action concerning sick leave abuse, the supervisor will notify the employee that their sick leave usage appears to be excessive. The purpose of the notification is to allow the employee the opportunity to identify the specific reason for the usage of sick leave, and to assist the employee in a cooperative way to alleviate the cause of the problem.

* * * * *

17.2. Industrial Accident Leave:

17.2.1 During an absence due to an industrial accident which has been accepted by the Risk Management Division, any employee covered by this agreement shall be entitled to receive an income supplement from the City for as many days as s/he had accrued sick leave prior to the accident. The amount of supplement is designed to provide no more net compensation while on time loss that s/he would have received while working their regular hours. . . .

* * * * *

17.2.3 Payments made by the City under subsections 17.2.1 and 17.2.2 shall not be charged to accrued sick leave.

22.4 Employee Rights:

22.4.1 There shall be one official personnel file maintained by the Bureau of Personnel. Upon signing this agreement, all future disciplinary actions will be maintained in the official personnel file. Any employee

shall be allowed to examine his/her personnel file upon request. An employee will be made aware of any information placed in his/her personnel file. Nothing herein shall preclude bureaus from maintaining unofficial personnel files.

22.4.2 All written working rules or regulations affecting the working conditions of any employee covered by this agreement shall be made available upon request to the Unions. The Union and the City shall meet immediately on any rule or regulation which tends to be in conflict with this agreement. It shall also be the responsibility of the City to inform employees of all rules and regulations which affect him/her as an employee.

23. PAY DAY

23.1 Payday shall be biweekly. . . .

32. EVALUATIONS / COUNSELING

Private discussions, evaluations or counseling may be used to review or evaluate employee performance or conduct and are not considered disciplinary action. Private discussions, evaluations or counseling are intended to acknowledge employee performance, identify standards of performance or behavior, and should result in reviewing employee progress in meeting identified standards of performance and behavior.

33. DISCIPLINE AND DISCHARGE.

33.1 Disciplinary actions or measures shall include only oral warning, written reprimand, demotion, suspension and discharge. Disciplinary action or measures may be imposed only for just cause. Any disciplinary action or measure imposed upon an employee may be processed as a grievance through the regular grievance procedure. * * * * *

33.2 **Discharge, Demotion and Suspension:** If, in any case, the City feels that there is just cause for discharge, demotion or suspension, the employee involved and the appropriate Union shall be provided with a written notice of proposed discipline seven (7) calendar days before the effective date. Such notification shall state the nature of the offense for which the employee is being discharged, demoted or suspended, in detail, specifying dates, locations and the particular nature of the offense committed by the employee and the right to respond to the authority proposing such action within seven (7) calendar days of receipt of written notice of imposed discipline as a grievance at Level Four (Article 34.3.6) of the grievance procedure. . . .

34. GRIEVANCES, COMPLAINTS AND ARBITRATION

34.1 To promote better City-employee relationships, all parties pledge their immediate cooperation to settle any grievances or complaints that might arise out of the application of this Agreement, and the following procedure shall be the sole procedure to be utilized for that purpose. The parties further agree that all meetings under this procedure will be conducted in a professional manner and in a spirit of mutual respect consistent with mutual resolution of grievances arising under this Agreement.

34.3 Procedure:

34.3.1 Time Limits: It is important that grievances be processed as rapidly as possible. The number of days indicated at each level should be considered as a maximum, and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement. Failure by the City to respond in writing within the time limits at each level shall render the grievance automatically appealed to the next level in the grievance procedure. The Union will advise the appropriate individual at the next level within a reasonable period of time.

34.3.3 Level One – Immediate Designated Supervisor:

a. If a dispute is not resolved at the informal level, the employee or Union shall file the grievance

on the appropriate form to the immediately designated supervisor outside the bargaining unit within twenty (20) working days of the claimed violation.

- b. This statement shall specify the provision or provisions of this Agreement claimed to be violated and the manner in which such provision is claimed to have been violated, all pertinent information, the remedy sought, and shall be signed by the employee and/or by the Union.

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34.3.4 **Level Two – Division Head:** * * * * *

34.3.5 **Level Three – Bureau Head / Personnel:** * * * * *

34.3.6 **Level Four – Board of Adjustment/Mediation:**

- a. If the grievance is not settled within five (5) working days following the conference noted in section 34.3.5 above, it may be referred to mediation or a Board of Adjustment within five (5) working days.
- b. If the City and the Union cannot mutually agree which procedure will be used, the matter will be referred to mediation.

* * * * *

34.4.7 **Level Five – Arbitration:**

- a. If the grievance remains unresolved at mediation . . . the local Union involved shall have the right to refer the matter to arbitration. In the event the local Union elects to do so, it must notify the Bureau of Personnel of its decision in writing within twenty-one (21) calendar days from the date of . . . close of mediation
- b. After the grievance has been referred to arbitration, the parties or their representatives shall jointly request the State Conciliation Service for a list of seven (7) arbitrators. The parties shall select an arbitrator from that list by such method as they may jointly select
- c. The arbitrator's decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of this Agreement. The decision of arbitration shall be within the scope and terms of this Agreement and shall be in writing.
- d. The City and the local Union involved shall divide equally the arbitrator's fee. . . .
- e. The time limits specified herein shall be jurisdictional unless waived by mutual agreement of the parties. * * * * *

Jt. Ex. No.2.

RELEVANT WORK RULE

SICK LEAVE/ABSENCES: To telephone a report of illness or any other absence, you must call your supervisor not later than 15 *minutes* before the beginning of your shift or the absence will be unpaid and discipline may result. Report sick leave directly to your supervisor. If you cannot reach your supervisor at his/her office telephone, leave a message on his/her voice mail

then follow-up with another call until you are able to talk to your supervisor directly. Illnesses of more than one day require you to call at least 15 minutes prior to the start of your shift each day of your absence unless other arrangements have been made with your supervisor.

* * * * *

Jt. Ex. No. 3, page 5.

STATEMENT OF THE FACTS

The Grievant is a Utility Worker II with the Bureau of Maintenance (BOM) of the Portland Office of Transportation. Until June 18, 2001, he was regularly assigned as a dump-truck driver on a night-shift street cleaning crew. Beginning on June 18, 2001, he was assigned to light-duty office-type work on day shift. His physician had ordered the light duty because the Grievant had suffered a work-related back injury (herniated disc) on March 21, 2001 and was scheduled to undergo surgery in July. See Ex. U-2. The physician had also prescribed Motrin and Oxycodone w/APAP as medications to treat the Grievant's back pain. See Ex. U-3.

By memo dated June 14, 2001, Public Works Manager Michael Boyle informed the Grievant that Linda Johnson would be his supervisor while he was working on day shift. Mr. Boyle provided his own office telephone number in the memo. Ex. E-12.

A work rule entitled SICK LEAVE/ABSENCES has been in effect in the Bureau for many years, requiring any employee who is sick or plans to be absent for any reason to call his/her supervisor's office telephone at least fifteen minutes before the start of the shift to report the absence. The rule expressly provides that "*the absence will be unpaid and discipline may result*" if the employee calls his/her supervisor *after* the 15-minute deadline. Jt. Ex. No. 3. The Grievant acknowledged by his signature, in July of 2000, that he had read the rule. See Ex. E-9.

While working on night shift, the Grievant had a history of calling in beyond the 15-minute deadline to notify his supervisor that he would be absent from, or arriving late for, his shift. See Exhibit E-5, p.1, 3, 6, 7, 11. His supervisor on night shift counseled him regarding the 15-

minute rule on those occasions.

The day shift schedule begins at 7:00 a.m. Typically, the 300 employees who work on that shift assemble in work crews upon their arrival. Each crew receives its pre-arranged schedule of work assignments for the day from a supervisor. Assignments vary, depending on the jobs that are scheduled to be accomplished throughout the City. If any employees on the various crews are going to be absent, the supervisors of the affected crews make last-minute adjustments in crew assignments, by negotiating with other crew supervisors. Supervisors need at least fifteen minutes to accomplish such adjustments. Testimony of Jeannie Nyquist.

On May 3, 2001, during a bargaining session for the successor to the parties' labor contract, the Union's bargaining representative presented to the Employer's representative a document challenging the continued applicability of the 15-minute call-in rule when an employee was sick. The document provided in pertinent part as follows:

“ . . . We cannot condone having represented employees required to follow a work rule prior to the beginning of their paid time. Especially since this rule carries a significant monetary penalty for non-compliance. To the extent that this practice is considered a past practice, The Union hereby notifies the City that the practice is rejected.”

Ex. U-1.

On June 18, 2001, the Grievant's first day on day shift, he reached Linda Johnson by telephone to report that he was experiencing car problems, a gas leak, and that he would not be able to get to work until the leak was fixed. Ms. Johnson recorded the time of the Grievant's call as 6:50 a.m. Exhibit E-6, p.1. She brought the telephone to Mr. Boyle, who then spoke with the Grievant about his problem. Boyle recorded in his diary that the Grievant's call had come in at 6:47 a.m. Exhibit E-7, p.1. Boyle told the Grievant to come in as soon as possible and wrote in his diary, “We will consider this time off as emergency vacation.” Id. The Grievant arrived at

work about 7:30 a.m. that day.

On the morning of June 22, 2001, the Grievant again called Linda Johnson. This time he told her that he was ill and would not be able to come in to work. Mike Boyle was present in the room when Ms. Johnson received the call. Testimony of Mike Boyle. Boyle reported in his diary on Monday, June 25, that the time the Grievant had made the call on June 22 was 6:50 a.m. See Exhibit E-7, p. 1 and 2.

When the Grievant returned to work on June 25, Mr. Boyle informed him that June 22 would be a “*no-pay day*”, because his telephone call had been made five minutes too late. The Grievant denied that his call had been late, saying he had made the call from his bathroom at 6:42 or 6:43 a.m. on June 22. Ex. E-7, p.2 and 3. He told Mr. Boyle he had been sick with nausea and constipation and he believed those were side effects of the pain medication he was taking.

The Grievant received his next paycheck on July 12, 2001. Testimony of the Grievant. He noted that he did not receive either sick leave pay or workers compensation reimbursement for his absence on June 22. See Jt. Ex. No. 4.

On or about July 16, 2001, the Union filed a grievance alleging that the City’s failure to pay sick leave for the Grievant’s June 22 absence constituted a suspension without just cause, in violation of Section 33.2 of the collective bargaining agreement. Jt. Ex. No. 4. The Union stated on the form that the suspension had become effective on the July 12, 2001 paycheck. The grievance was received at the City’s Bureau of Human Resources on July 17, 2001. Id.

On October 3, 2001, Damon Mabee, Union Field Representative, sent a letter to Wendy Greenwald, the State Conciliator, requesting assignment of a state mediator to assist the parties

in resolving the grievance. Exhibit E-1. The letter referenced the parties' representatives and the contractual provision, Article 33.2, that allowed suspensions to be appealed directly to the fourth step of the grievance process, mediation. A mediation session subsequently took place, but the parties were unable to resolve the grievance. Therefore, the case moved to the arbitration stage.

POSITIONS OF THE PARTIES

A. The Employer:

(1) *Substantive Arbitrability:* The Employer denies that it issued a suspension to the Grievant, as alleged by the Union. Therefore, this grievance is not about a "suspension" at all. The Grievant's loss of pay for his June 22, 2001 absence was premised on his failure to comply with a long-established work rule requiring employees to make a telephone call at least fifteen minutes before the start of their shift. The 15-minute rule is not covered by the parties' labor contract. It is a reasonable work rule that has been in effect for approximately 32 years in the City of Portland, has been applied in hundreds of cases and has never been grieved by the Union.

According to the 15-minute rule, an employee who calls in late is not eligible to use his/her sick leave for the day. This is an automatic consequence of violating the rule and is not discipline, in the Employer's view. The rule provides that the Employer may take disciplinary action, if appropriate, *in addition to* denying paid leave. Many employees have been disciplined for multiple violations of the rule and some employees have even been discharged.

In the Grievant's case, the only consequence that was implemented for his late call on June 22, 2001 was denial of sick leave. No disciplinary action was taken against him.

Therefore, the Union's grievance, which alleges that a suspension occurred, is not substantively arbitrable.

(2) *Procedural Arbitrability:* In the alternative, the Employer contends that the Union's grievance was not filed in accordance with the contractual time limits, which are jurisdictional. Therefore, it is not procedurally arbitrable.

If, as the Union asserts, the denial of sick leave pay for June 22 constituted a "suspension", then the grievance should have been filed no later than seven calendar days after June 22, according to Article 33.2. Since the Union filed the grievance on July 17, it clearly exceeded the seven-day time limit.

If, on the other hand, the denial of sick leave was not a suspension, but an alleged violation of contract language, the Union was obliged to file its grievance within twenty (20) work days after June 22 and then proceed through all five steps of the grievance procedure. Such a grievance could not be filed directly at Level Four.

In either situation, the Union is attempting to fit a square peg in a round hole, in the Employer's view. The Union failed to abide by the contractual time limits. As a result, the Union should be barred from proceeding to arbitration on the merits.

(3) *The Merits:* In the event the arbitrator should find that the grievance was both substantively and procedurally arbitrable, the Employer contends that the evidence does not establish a violation of the parties' labor contract. Therefore, the grievance should be dismissed.

First of all, the Grievant was not suspended, as the Union alleges. No written notice of suspension was issued to the Grievant and nothing was placed in his personnel file.

Secondly, his denial of sick leave on June 22, 2001 was disciplinary action, but the

automatic consequence of his failure to meet a condition precedent to receiving sick leave pay under a long-standing work rule. He failed to call his supervisor at least fifteen minutes prior to the start of his shift to report that he was sick and unable to work that day. He was well aware of the 15-minute rule and its consequence.

B. The Union:

(1) Substantive Arbitrability: The Union contends that the denial of sick leave for the June 22, 2001 absence constituted a one-day “suspension”. Simply stated, the Grievant did not receive pay to which he was contractually entitled for the day. Suspensions are expressly covered by the parties’ collective bargaining agreement in Articles 33.1 and 33.2. Therefore, the matter is covered in the labor agreement and the grievance is substantively arbitrable.

(2) Procedural Arbitrability: The Grievant’s July 12, 2001 pay check was the first written document he received that showed he had been denied sick leave for his June 22 absence. The Union filed the grievance within five calendar days of that day. The Union asserts that the Employer’s action constituted a disciplinary suspension and, as such, was appealable directly to Step Four, the mediation stage, under the contractual grievance procedure. Therefore, the grievance met the procedural requirements of Article 33.2 and is arbitrable.

The Union also points out that the Employer first raised its procedural objection to the grievance on May 1, 2002, more than nine months after the grievance was filed and less than a month prior to the arbitration hearing itself. Such a delay, says the Union, constituted a waiver of any procedural objection that might otherwise have been available to the Employer.

(3) The Merits: First, the Union contends that the Grievant actually called in at 6:42 or 6:43 a.m. on June 22, 2001. Therefore, he met the work rule requirement of a fifteen-minute

notice of absence due to sickness. The Grievant had set his watch according to one of the clocks in the workplace and he believed he was calling in on time when he spoke with Ms. Johnson and Mr. Boyle that morning. Since the City's clocks are not all set to the same time, however, the supervisors recorded a different time for the call and then relied on that time to penalize him.

The Union contends the penalty imposed, denial of sick leave pay for the day, constituted a suspension without just cause. Since the Grievant was ill that morning from medication he was taking for a back injury he had suffered on the job, he would have been eligible to recover Workers Compensation to replace his sick leave use. Therefore, when the Employer denied him his use of sick leave, he also was deprived of Workers Compensation payment for the day. The Union asks that the Grievant be made whole for his loss of income.

DISCUSSION

(1) Is the grievance substantively arbitrable?

Arbitration is a consensual dispute-resolution process. A party to a collective bargaining agreement is required to arbitrate only such subject matter as is covered by the agreement. Ordinarily, a challenge to substantive arbitrability is for a court to decide. In public-sector cases in Oregon, however, the Employment Relations Board (ERB) decides such challenges. In the instant case, the parties stipulated that they would authorize the arbitrator to decide the substantive arbitrability issue.

There has long been a strong presumption favoring arbitrability of grievances. This presumption first arose in the challenges to arbitration that were decided by the U.S. Supreme

Court in the *Steelworkers Trilogy*¹. The Oregon ERB has followed the rationale of the Supreme Court when deciding substantive arbitrability issues in Oregon public-sector grievances and the Oregon Court of Appeals has approved the Board's rationale. See, *Luoto v. Long Creek School Dist. No. 17*, 9 PECBR 9314, *aff'd* 89 Or App 34, 747 P2d 370 (1987), *rev den* 305 Or 576 (1988). Specifically, ERB held in *Luoto*, that "arbitration should be ordered unless [it can be said] with *positive assurance* that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute." 9 PECBR at 9331 (*emphasis added*).

Arbitrator Jack Calhoun further explained the rationale of substantive arbitrability, in an Oregon public-sector case in which the parties had granted him jurisdiction to decide the issue, by stating: "Consideration of the merits of a grievance will not be denied unless to do so would violate the terms of the agreement." *City of Beaverton*, 107 LA 1205 (1997). In other words, Arbitrator Calhoun would want to see in the parties' collective bargaining agreement an express provision *excluding* the subject matter of the grievance from arbitration, before he would grant a substantive arbitrability objection. Arbitrator Calhoun's view is consistent with the ERB rationale and the opinions of many other arbitrators.

The Union's grievance form in the instant case alleges that the subject-matter of the case concerns a "suspension". Article 33 of the parties' collective bargaining agreement clearly and unambiguously provides that "suspensions" are disciplinary issues, appealable at Level Four (the Mediation stage) of the grievance procedure. Also, Sick Leave, as well as Industrial Accident reimbursement of sick leave taken due to work-related injuries, are benefits that are expressly covered in the parties' contract. Therefore, assuming that the Union can adequately demonstrate

¹ *Steelworkers v. American Mfg. Co.*, 80 S. Ct (1960); *Steelworkers v. Warrior & Gulf*, 80 S. Ct. 1347 (1960);

that the action taken, denial of sick leave, could be construed as a “suspension”, the grievance is substantively arbitrable as presented.

(2) *Is the grievance procedurally arbitrable?*

It is axiomatic that the negotiated timelines contained in labor contracts for filing and processing grievances are to be followed by the parties. It sometimes happens, however, that the date on which a particular grievance arose is in dispute. In such a case, the contractual deadline for filing a grievance would be unclear, even though the grievance procedure itself had established a specific number of days as the maximum during which a grievance could be filed.

Arbitrator Calhoun was faced with a challenge to procedural arbitrability in *City of Beaverton, supra*. The issue in that case was whether the city had properly denied employees payment for their travel time to attend an out-of-town training program. The date on which all affected employees and the union had become aware of the city’s action was in dispute. Some employees found out about the denial on January 22, 1996, when the decision was made, but others learned about it on February 9, when paychecks were issued. Arbitrator Calhoun held that the date on which *all* the employees knew “*unequivocally*” that the city was not going to pay them for the travel time was the day they received their pay checks. *107 LA at 1209*. The pay check date constituted the beginning of the timeline for filing a grievance over the matter, therefore, he said, even though the contract required that grievances be filed no more than fifteen

Steelworkers v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358 (1960).

days after the affected employee or union “has knowledge or by reasonable diligence should have known of the alleged grievance”. *Id at 1206. See also, Continental Telephone, 83 LA 1092 (Arb. Daughton, 1984).* Calhoun explained: “Doubts as to the interpretation of time limits on filing grievances should be resolved *against the forfeiture of the right to process a grievance.*” *197 LA at 1209 (emphasis added).* This arbitrator agrees with Calhoun’s analysis.

Article 33.2 of the parties’ contract herein provides for a fast-track treatment of grievances over three specific types of disciplinary actions: discharges, demotions and suspensions. Grievances alleging that there was no just cause for any of such disciplinary actions must be filed within seven calendar days of the date the affected employee receives *written* notice of the Employer’s action. Such grievances may then proceed directly to Level Four of the grievance procedure, skipping over Levels One, Two and Three entirely.

It was the fast-track process that the Union invoked in the instant case. The Union alleged that the Grievant had been “*suspended*” on June 22, 2001, and then processed the grievance at Level Four – the mediation stage. The City emphatically denies that it “suspended” the Grievant and no document referencing a “suspension” exists. Assuming at this point, however, that the Union can show the City’s action constituted a “*suspension*”, the arbitrator must determine when the Grievant first knew, through a *written* document, of the City’s action, as that date will determine whether the Union met its contractual deadline under Article 33.2 for filing a grievance over such action.

The Grievant testified under oath at the hearing that the first day he knew he would not be compensated for his June 22 absence was July 12, when he received his pay check and pay stub for the time period that included June 22. BOM Public Works Manager Michael Boyle

testified that he *told* the Grievant on June 25 that his June 22 absence would be unpaid. However, neither Mr. Boyle nor any other witness testified that the Grievant received any written notice regarding the decision to deny sick leave coverage prior to July 12, when the pay check was issued. The manager could have changed his mind after the June 25 meeting and authorized the sick leave use, based on his discussion with the Grievant. The pay check was the first unequivocal notice the Grievant received regarding the Employer's action.

The Union's grievance form, alleging that the "*suspension*" had been without just cause, was stamped as "*Received*" by the Employer's Labor Relations office on July 17. *Exhibit E-4*. July 17 is only five days after July 12 and is within the seven-calendar-day time limit set forth in Article 33.2 for grieving a suspension.

The parties agree that they both treated the grievance as a Level Four filing pursuant to Article 33.2 and proceeded directly to mediation. Therefore, assuming that the Employer's action withholding compensation for the June 22 absence constituted a "*suspension*", the grievance was timely and is procedurally arbitrable. It is not necessary to reach the Union's alternative argument that the Employer waived its procedural objection by not raising it until May 1, 2002, about ten months after the grievance was filed.

(3) *Did the City suspend the Grievant on June 22, 2001?*

The critical question at this juncture is whether the Grievant received, in fact, a "suspension". The Employer contends the denial of sick leave pay was simply the automatic consequence of the Grievant's phone call being made less than fifteen minutes before the start of his shift. It was not a suspension, but simply the implementation of a long-standing work rule that establishes a pre-condition for eligibility to use accrued sick leave. If an employee fails to

call at least fifteen minutes before the start of his or her shift, he or she is ineligible. The rule authorizes the Employer to impose discipline *in addition* to denying the use of accrued sick leave when an employee calls in late. The Employer did not impose any discipline on the Grievant in this situation however.

The Employer supports its argument by pointing out that the parties' contract requires the Employer to provide a *written "notice of suspension"* at least seven calendar days before the effective date of any disciplinary suspension. See Article 33.2. The notice is supposed to include *"the nature of the offense. . . in detail, specifying dates, locations. . . and the right to respond to the authority proposing such action either orally or in writing prior to the effective date of the [suspension]."* The Employer gave no such written notice to the Grievant or the Union, nor was any written disciplinary notice placed in the Grievant's personnel file.

It is a long-established principle among labor arbitrators that contract language should be interpreted in a reasonable manner and not in a manner that leads to harsh, absurd or nonsensical results. It would be absurd to conclude that, where an Employer had failed to issue a written *"notice of suspension"* in the particular manner that is required by the parties' collective bargaining agreement, no suspension had occurred and no grievance could be filed. The arbitrator must consider all the relevant facts and circumstances and determine whether the *nature* of the action that was taken, not simply the *format* used by the Employer, was the equivalent of a disciplinary suspension. It is the meaning of the word *"suspension"* in the context of workplace parlance, therefore, that is relevant, not just the contract's requirement as to what a *"suspension"* document should look like. To interpret the contract otherwise would be to elevate form over substance and would not be reasonable.

In the workplace, a “suspension” usually involves staying home for a day or more without pay. The suspended employee is either sent home or told not to come to work, as punishment for an infraction such as violating a work rule, and is denied any payment for the lost work time. See testimony of David Shaff. That is precisely what happened to the Grievant on June 22, 2001, as a result of the City’s decision to deny him the right to use his accrued sick leave.

Another source that can be helpful in defining disputed terms is a dictionary. The definition of “*suspension*” in *Webster’s New Student’s Dictionary* (1964 ed.) includes the following, in pertinent part:

Suspension 1. The act of suspending or the state or period of being suspended: as
a: *temporary removal from office or privileges* **b:** *temporary withholding* (as of belief
or
decision) **c:** *temporary abrogation of a law or rule. . . .*
(Italics added).

Using that dictionary definition, one can infer that, on June 22, 2001, the Employer made a decision to implement a “*temporary removal*” or a “*temporary withholding*” of the Grievant’s contractual right to use his accrued sick leave. Also, the evidence reasonably establishes that the decision “*abrogated*” the Grievant’s contractual right to recover an Industrial Accident reimbursement of the sick leave he would have used for that day, pursuant to Article 17.2.1.

The Grievant’s pay check, which was issued on July 12, 2001, was the first written document that confirmed the loss of pay for his June 22, 2001 absence. Therefore, that paycheck constituted a written notice of the “suspension”, even though it failed to comply with the contractual requirements of such notice.

The arbitrator concludes from the foregoing that the Union’s grievance reasonably

alleges that the Employer's action in withholding the Grievant's use of his accrued sick leave had been a "*suspension*". Pursuant to Article 33.1, the Employer must show that it had just cause to take the action.

(4) *Did the City have just cause for taking the action?*

The elements of "*just cause*" can be summarized by reference to the following questions:

(A) **NOTICE:** Is the Work Rule that is alleged to have been violated reasonably related to the safe, efficient operation of the Employer's business and did the Grievant have notice of the rule and the consequence of violating the rule?

(B) **INVESTIGATION:** Did the Employer conduct a fair and reasonable investigation to determine the facts of the matter before making the decision to discipline?

(C) **PROOF:** Did the Employer produce sufficient proof that the Grievant was guilty as charged?

(D) **PENALTY:** Was the penalty that the Employer imposed appropriate under the circumstances?²

If any of these questions can be answered in the negative, it is likely that the Employer lacked just cause for the action it took.

(A) **NOTICE:** The charge against the Grievant in this case is that he violated in a well-known work rule that requires all employees to call in at least fifteen minutes before the start of their shift if they will be absent or late. The rule provides that the "absence will be unpaid and discipline may result" when the employee fails to call in on time. The arbitrator is persuaded by the evidence that the call-in portion of the rule is reasonably related to the Employer's need for efficiency and productivity in managing its operations. The rule's provision regarding penalties is more complicated and will be discussed in detail in this report.

² The elements of just cause have long been described in accordance with Arbitrator Carroll Daugherty's "seven tests". See, e.g., *Enterprise Wire Co.*, 46 LA 356 (1966); *Koven & Smith, Just Cause: The Seven Tests* (2nd ed.

City witnesses Jeannie Nyquist and Mike Boyle testified convincingly that supervisors assign workers to various work crews prior to the start of each shift. If some employees are going to be absent or late, their supervisors need to have sufficient notice to be able to negotiate among themselves before the shift-starting time and make appropriate substitutions on the various crews, so that the work that has been scheduled for the day can be accomplished. Fifteen minutes is the minimum amount of time that is needed to make such adjustments and still provide necessary information on the work assignments to all the workers who arrive at the start of the shift. When supervisors get last-minute notice of absences or tardy arrivals, their ability to make adjustments is seriously hampered and some crews may be held up from getting out on the road. The resulting delays can have serious ripple effects, such as interfering with carefully-scheduled street closures, traffic routing changes and utility shut-offs. The need to provide the public with safe, orderly City services requires that such delays and interferences be avoided.

Also, the fifteen-minute notice requirement does not intrude unreasonably on the employees' private life and off-duty activities. Regardless of where a City employee lives, he or she must leave home prior to the shift starting time in order to arrive at City Hall on time for his/her shift. It is reasonable to expect, therefore, that an employee would know, at least fifteen minutes prior to the shift starting time, whether he or she will have to miss work that day or is going to arrive late. The rule does not require that the employee spend a lot of time making the required phone call to his or her supervisor. The rule provides that the employee may leave a message on the supervisor's VoiceMail system if the supervisor cannot be reached directly by the 15-minute deadline. The employee is supposed to continue calling until actual contact is

1992). This arbitrator prefers to summarize the "seven tests" in four categories: Notice, Investigation, Proof and Penalty.

made with the supervisor. However, those successive calls do not have to be made prior to the 15-minute deadline.

Nevertheless, the rule is premised on some assumptions. First, it assumes that the employee is capable of getting to a phone at least fifteen minutes before the shift starts. If phones are out of service, or if an employee is incapacitated or trapped in a traffic jam or weather emergency, it might be impossible to comply with the rule through no fault of the employee. Also, the rule anticipates that the supervisor who actually receives an employee's call records the correct time that the call is made. And, if a call is made to a supervisor's VoiceMail box, the rule assumes that the box retains the message and accurately records the time the call was made.

The parties do not dispute that the Grievant was well aware of the call-in rule. He acknowledged in writing on July 5, 2000, that he had read the City's Work Rules, which had been updated that year, including the SICK LEAVE/ABSENCE rule that is in dispute here. *See Exhibit E-9.* Also, the evidence shows he had a history of violating the call-in rule when he worked on night shift, prior to being reassigned to day shift. His supervisor, Scott Weaver, had counseled him a number of times for making late calls. According to notes in Weaver's diary, the Grievant called Weaver less than fifteen minutes before the starting time of his shift on five different occasions in 2000 and 2001 to report that he would either be absent or would arrive late for work that day. *See Exhibit E-5.* Weaver did not appear at the hearing. However, the Grievant did not deny that those incidents had occurred.

What is curious is that the evidence does not show that Scott Weaver denied the Grievant his right to use accrued sick leave when he called late to report he was sick, nor did Weaver tell

the Grievant to stay home and take a no-pay day when he called in late to say he would arrive late for his shift. On February 27, 2000, Weaver wrote that he had “talk[ed] to [Grievant] about calling in before 9:15 *or it would be no pay.*” *Exhibit E-5, page 2 (emphasis added)*. The very next time the Grievant called in late, however, May 24, 2000, Weaver noted that he “*charged him 15 min[utes] vac[ation].*” *Exhibit E-5, p. 3*. Then on both March 8 and March 26, 2001, Weaver noted that he would “talk to [Grievant] about this”. *Exhibit E-5, p. 6 and 7*. And finally, on April 12, 2001, Weaver reported telling the Grievant, “This needs to stop; we start work at the same time every night and you need to just get hear (sic) on time” *See Exhibit E-5, p. 11*. It appears that Weaver’s practice was to “talk to” (counsel) the Grievant about late calls, rather than to apply the penalty that is expressly referenced in the work rule.³

The arbitrator concludes from this history that the Grievant had received conflicting information about the penalty that would be imposed if he violated the 15-minute call-in rule. He had read the rule and knew that the Employer could deny sick leave and make an absence a non-paid day, if he were to call-in less than 15 minutes before the start of a shift to report that he would be absent or late. His experience, however, on night shift, was that the usual penalty for violating the call-in rule was a counseling. The notice that he had received prior to June 22, 2001, therefore, was at best equivocal, with regard to the penalty that would be enforced for future violations.

B. INVESTIGATION: City Maintenance Director Nyquist and BOM Public Works Manager Boyle both acknowledged in their testimony that an investigation would be appropriate before a supervisor should decide to implement any penalty for an employee’s

³ The Grievant did acknowledge in his testimony that he had been denied sick leave by supervisor Weaver on one

violation of the 15-minute call-in rule. Nyquist testified that, in her experience, supervisors do not rigidly apply the rule's stated consequence of an unpaid day when an employee calls in late. She said supervisors usually look at the circumstances surrounding the late call, as well as the employee's work history, especially any prior incidences of violating the call-in rule, before deciding how to handle a late call. If the employee had a "good reason" for making the late call, the use of sick leave would not be denied, she said.

When asked for examples of such "good reasons", Nyquist testified that the triggering problem behind the late call would have to be "something beyond the employee's control". She cited as one example of an acceptable excuse, an incident involving a power outage that had affected the accuracy of an employee's clock. On other occasions, traffic tie-ups and severe weather problems have justified late calls, she said.

Mr. Boyle essentially concurred with Ms. Nyquist's analysis. He said he had waited until Monday, June 25, before deciding to withhold sick leave for the Grievant's June 22, 2001, absence, precisely to allow the Grievant to explain the facts surrounding the call that ultimately led to this grievance.

The City seems to take a contrary position in its brief, however. The City argues that the "unpaid day" that is referenced as the primary penalty in the work rule itself is not discipline at all, but is merely an automatic consequence of the late call, and that the City can take appropriate progressive disciplinary action *in addition to* the denial of pay, against any employee who violates the rule.⁴ In taking such a position, the City essentially denies that it needs to make an

occasion, due to a late call. It is unclear when that incident occurred, however. No documentation was offered.

⁴ In its brief, the City writes:

The call-in rule is not disciplinary. The rule is written in the conjunctive. It provides

investigation into the facts surrounding a late call, before determining whether it is appropriate to treat the day as a no-pay day.

The City argues in its brief that the 15-minute call-in rule is analogous to the work rule that requires three days' advance notice for an employee to use accrued vacation at the time he or she wishes to use it.⁵ That analogy is misplaced, however. There is express contract language, in Article 15.7, *requiring* employees to have "prior approval" for use of their accrued vacation time. The work rule merely fleshes out the time period that is required for obtaining such approval. There is no such condition precedent to the use of a day or two of sick leave set forth in the parties' contract, except where an employee has established a "pattern of sick leave abuse". See Article 17.1. And, even when such a "pattern" has been identified, the contract allows the offending employee a right to notice and an opportunity to explain and alleviate the problem, before any condition is imposed on the employee's continued use of the sick leave benefit. *Id.*

The City cannot have it both ways. The City cannot say, on the one hand, that some "serious reasons" might justify a supervisor's authorizing the use of sick leave by an employee who has called in beyond the 15-minute call-in deadline to report sickness, and, on the other hand, that denial of sick leave is merely an automatic consequence of any call that fails to meet the 15-minute rule and is not discipline at all. The City should recognize that, when a "consequence" of a work rule violation has an adverse effect on a contractual right or benefit,

that the absence may be unpaid and discipline may also result. . . . By its terms, the work rule permits the Maintenance Bureau to prevent the employee from using accrued sick leave and further permits the Bureau to impose progressive discipline." *Brief at p.7.*

⁵ At page 8 of its brief, the City writes:

"Both rules regulate **how** and **when** employees may **access** accrued leave. As such, they simply do not constitute discipline."

that is the equivalent of a “penalty” or a “disciplinary action”. According to Article 33.1, the City was required to have just cause for imposing the penalty of an “unpaid absence” in its 15-minute call-in rule. Therefore, a reasonable investigation would be required before such action could be implemented, as Ms. Nyquist and Mr. Boyle both suggested by their testimony.

The arbitrator now will consider the evidence surrounding the Grievant’s alleged late call on June 22, 2001, to determine whether a reasonable investigation was conducted before he was denied the right to use his accrued sick leave that day.

The evidence shows, first, that Supervisor Mike Boyle waited until he could talk to the Grievant on June 25. When Mr. Boyle interviewed the Grievant, however, he did not seem to “hear” the Grievant’s defenses. First, he accused the Grievant of calling in late twice in the same week, but he failed to “hear” the Grievant deny that he had called in late at any time that week. The Grievant said he believed he had called at 6:42 or 6:43 a.m. on Friday, June 22. Mr. Boyle said, however, that the Grievant had called in at 6:50 a.m. on both Monday, June 18 and Friday, June 22. He said he had given the Grievant the “benefit of the doubt” on Monday, however. The Grievant pointed out that he had set his watch according to the assembly room clock, which he had been told was the “official” clock. His watch read 6:42 or 6:43 a.m. when he made the June 22 call, and he said he believed his call on Monday had been timely. He said he had called the dispatch office first both times, because he did not know the number of his new supervisor on day shift. The dispatch officer then put him through to the office of Ms. Johnson.⁶

If Mr. Boyle had investigated, he might have learned that both he and the Grievant

⁶The Grievant also testified that he had placed a call at 6:35 a.m. on June 18 or 22 to Supervisor Judy Brown and had left a message on her VoiceMail, prior to calling dispatch and speaking with Ms. Johnson. Apparently he was confusing a later incident with the June incidents, when he offered that testimony. Ms. Brown did not become his supervisor until sometime *after* June of 2001. The arbitrator did not find that the Grievant lacked credibility, as the

were “right” in reporting the time the Grievant had made his calls on June 18 and June 22. The parties agreed at the hearing that the clocks in the workplace were not synchronized. There were some inconsistencies at that time. Boyle said he had determined the time of the June 22 call from looking at his computer or his watch and that it was possible that one or both of those timepieces was a few minutes fast. The clock in the large meeting area where the employees congregate upon arrival was not visible to him at the time, he said. He did not take the step, during the June 25 meeting with the Grievant, however, to determine whether the assembly room clock was, in fact, set a few minutes ahead of the time shown by his computer and his watch. Also, if Mr. Boyle had compared his own notes regarding the June 18 call with Ms. Johnson’s notes of that call, he would have discovered that they did not agree as to the time the Grievant’s call had come in on that occasion. Johnson recorded the time as 6:50 a.m., but Boyle, who spoke to the Grievant *after* Johnson, recorded it as 6:47 a.m. See Exhibits E-6, p.1 and E-7, p.1.

The arbitrator is persuaded that Mr. Boyle already had his mind made up on Monday, June 25, that the Grievant’s calls on June 18 and 22 had been made late. He had already decided that the Grievant had been given the “benefit of the doubt” on the 18th and that he deserved the penalty of a no-pay day for a late sick call on the 22nd. The investigation which he conducted on June 25 did not meet just cause the requirement. Mr. Boyle, who acted as both prosecutor and judge, did not attempt to determine whether the Grievant’s side of the story had merit.

C. PROOF: The evidence shows that the Grievant had a history of calling in late when he worked on night shift. However, he had only been verbally counselled for those prior incidents. Also, the evidence shows that Supervisor Boyle believed the Grievant had made

his call on June 18, 2001, two minutes after the 15-minute deadline had passed. The evidence does not show that Boyle informed the Grievant that his call was in violation of the call-in rule that day, however. It simply shows that Boyle made the decision to allow the Grievant to take emergency vacation for thirty minutes of late arrival time that he incurred that day. Finally, the evidence establishes that there were inconsistencies between the clocks in the workers' assembly room, on Mr. Boyle's computer and on Ms. Johnson's desk. As a result of those inconsistencies, the precise time that the Grievant made his calls on June 18 and June 22 could not be determined. Both calls may have been timely.

Furthermore, even if the Grievant's call on June 22 actually was made beyond the 15-minute deadline, the lateness may have been caused by forces beyond his control, which, according to Ms. Nyquist and Mr. Boyle, would have allowed him to qualify for sick leave. The Grievant testified that he had not been sick during the night and, when he woke up he fully intended to go to work that day. He discovered sometime after 6:00 a.m. that he was constipated and nauseous. He thought he could overcome those symptoms, but they did not go away. Nausea and constipation are listed as possible side-effects to the medications that were prescribed by the Grievant's doctor to treat his work-related back injury. See Exhibits U-3, U-7, U-10. The Grievant said he "sat and sat" and finally called his supervisor from his bathroom stool, when he realized he was sick enough to miss work that day. He believed at the time that he was making the call at 6:42 or 6:43 a.m.

For these reasons, the arbitrator is not persuaded that the City had adequate proof that the Grievant was "guilty" of making a late call on Friday, June 22.

D. THE PENALTY: Every employer has the right to expect employees to appear for work on time and to comply with reasonable work rules. When an employee fails to do so, the employer may take reasonable disciplinary action. Sometimes, employers establish prescribed disciplinary measures for certain infractions. When such prescribed discipline is unrelenting, however, and fails to give regard to the individual facts and circumstances surrounding a particular violation, the employer risks violating the contractual requirement of just cause. One arbitrator has called such a prescribed penalty a built-in “fatal flaw”. *See, St. Joseph Mercy Hospital*, 87 LA 529, 533 (Arb. Daniel, 1986).

The arbitrator is persuaded that the 15-minute call-in rule is reasonable and even critical to the efficient accomplishment of City services. Employees must take the rule seriously and they may be subject to appropriate progressive discipline for non-compliance. However, as Ms. Nyquist and Mr. Boyle acknowledged in their testimony, individual facts and circumstances must be considered in each case, to ensure that whatever penalty is imposed does not violate just cause.

The Grievant had a poor history of complying with the 15-minute call-in rule in 2000 and 2001. The ordinary penalty that his supervisor on night shift had imposed on him, when he violated the rule on night shift, was a verbal counseling.

The arbitrator is not persuaded that the Grievant violated the call-in rule on either June 18 or June 22, 2001. Clearly, he called in at approximately the last minute on both of those days. However, because of the discrepancy in the clocks, it could not be determined with certainty whether either call was actually made after 6:45 a.m. Also, there appears to have been good reason for the last-minute timing of the June 22 call. The Grievant’s sickness came on him after

he got up in the morning and may have been caused by the medication he was taking for a work-related injury. Therefore, it is likely that his use of sick leave for the day would have been reimbursed by Industrial Accident Leave coverage, pursuant to Article 17.2 of the labor contract.

Under the circumstances, the Employer did not have just cause to “suspend” the Grievant, by denying his use of sick leave for his absence on June 22, 2001. The grievance is granted.

AWARD

For the reasons stated in the foregoing Opinion, the grievance is substantively and procedurally arbitrable. The City did not have just cause to suspend the Grievant by denying his use of accrued sick leave to cover his absence on June 22, 2001. The Grievant shall be made whole for all lost wages and benefits incurred as the result of the denial of sick leave.

The arbitrator retains jurisdiction over this matter for thirty (30) days, to assist the parties with implementing the remedy.

The parties shall share equally in paying the arbitrator’s fee and expenses.

DATED: _____ Respectfully submitted,

SANDRA SMITH GANGLE, J.D.
Arbitrator